SUPREME COURT, U. S.

FILED

JUL 18 1968

JOHN F. DAVIS, CLERK

No. 310

In the Supreme Court of the United States

OCTOBER TERM, 1968

DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY, PETITIONER

v.

DONALD S. NASH AND SYLVIA K. NASH

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ERWIN N. GRISWOLD,
Solicitor General,
CLYDE O. MARTZ,
Assistant Attorney General,
JOSEPH J. CONNOLLY,
Assistant to the Solicitor General,
ROGER P. MARQUIS,
WILLIAM M. COHEN,
Attorneys, Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No.

DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY, PETITIONER

v.

DONALD S. NASH AND SYLVIA K. NASH

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the District of Columbia Redevelopment Land Agency, petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is not officially reported. A supplemental opinion on denial of rehearing *en banc* is set out in Appendix B, *infra*.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 1967 (App. C, *infra*). A petition for rehearing *en banc* was filed, within the time as extended by the court, on December 11, 1967, and was

denied on April 19, 1968 (App. B, *infra*). The jurisdiction of this Court in invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in condemnation proceedings to determine just compensation for property taken, evidence of the price for which the condemnor was willing to settle for other properties acquired for the same project was admissible when introduced by the condemnee.

STATEMENT

By declaration of taking filed on October 29, 1965, the District of Columbia Redevelopment Land Agency acquired in fee a number of parcels of land for the Northwest Urban Renewal Project No. 1 for the clearance and prevention of a slum and blighted area. Included in the declaration were three parcels owned by Donald S. Nash and Sylvia K. Nash, his wife, which were then being used as a parking lot. A jury trial was held in June 1966, to value them.

At trial, the Agency's expert appraisal witness testified that the fair market value of the three Nash parcels, based upon a number of comparable sales, was $56,576. The landowners' expert, on the other hand, stated his opinion that the parcels were worth $142,000. Over the Agency's objection, the witness was allowed to support his appraisal by testifying as to the price paid by the Agency in settlement for a nearby junkyard condemned in the same declaration of taking as the Nash parcels. Although the Agency showed that the price cited by the witness was not a final payment, but merely an offer arising out of unconsummated settlement negotiations, the district court ruled

that since the settlement negotiations had advanced almost to completion, the transaction could be considered as a comparable sale by the jury.

On June 17, 1966, the jury returned a verdict of $90,000, from which both sides appealed. The court of appeals unanimously affirmed the judgment on the landowners' appeal and, one judge dissenting, rejected the Agency's contention that the trial court had erred in admitting evidence of the pending settlement offer (App. A, *infra*). On the Agency's petition for rehearing *en banc*, which was denied 5–3, the two judges comprising the majority of the panel below joined in a statement which rested the decision on the following rationale (App. B, *infra*, pp. 24–25):

> Whenever the Government decides to pay a certain price, it has arguably made an uncoerced judgment as to fair market value which is relevant in the trial of any other condemnation of related property, and which, when offered by the condemnee, the trial judge does not err in admitting, provided he gives the Government a full opportunity to show to the jury the differences between the two properties which explain the disparity in the Government's respective evaluations.

REASONS FOR GRANTING THE WRIT

The court below departed from the "almost, if not quite, universal" rule that settlements in condemnation proceedings, like other compromises of litigation, are inadmissible in evidence. 5 Nichols, *Eminent Domain* § 21.33 (3d ed. 1962). That rule is founded on the courts' recognition that sales made under

pressure of the exercise of the government's eminent domain power are made under compulsion or coercion and do not reflect fair market value, and that the admission of such sales into evidence would tend to defeat the policy of encouraging settlement of disputes without resort to trial. Unless corrected by this Court, the decision below is likely to infect future condemnation proceedings with unreliable evidence and seriously to deter the government from continuing its practice of favoring negotiated settlements in its land acquisition program.

1. As the court below implicitly recognized (App. B, *infra*, pp. 22–23), its holding is in conflict with the decisions of three other circuits. In *Slattery Co.* v. *United States*, 231 F. 2d 37, 40–41, the Fifth Circuit rejected a landowners' contention that the trial court had erred in excluding evidence of the purchase price paid by the government for other properties in the area:

> [A]ppellant cites only authorities supporting the general principle that consideration should be given to prices paid in voluntary sales, that is in dealings between persons willing and able, but not compelled, to buy or sell, it cites none applying that principle to prices paid by one having the right of eminent domain.
>
> Appellee, on its part, cites many cases from this circuit and elsewhere, laying down the rule that "The prices paid in settlement of condemnation proceedings or the sum paid by the condemnor for similar land, even if proceedings have not been begun, is inadmissible." This rule, based upon the view that such payments

> are in the nature of compromise to avoid the expense and uncertainty of litigation and are not fair indications of market value, is the generally prevailing rule in this circuit and elsewhere. * * *[1]

And in *United States* v. *13,255.53 Acres of Land in New Jersey*, 158 F. 2d 874, 877, the Third Circuit rejected a similar contention, stating:

> The final point is that the District Judge wrongfully barred the owners' offer of proof of the amounts paid by the government for other property condemned in the same proceeding. We find no error in that ruling. Testimony of the price paid by the condemnor for other tracts is not admissible.

Finally, the Eighth Circuit has recently expressed approval of the rule "that evidence of prices paid by the government for the purchase through private negotiations of lands in connection with a project condemned or to be condemned is not generally admissible." *Evans* v. *United States*, 326 F. 2d 827, 831. See also *Murdock* v. *United States*, 160 F. 2d 358, 362 (C.A. 8); *United States* v. *Foster*, 131 F. 2d 3, 5 (C.A. 8), certiorari denied, 318 U.S. 767.

2. The rationale of the decision below (*supra*, p. 3) proceeds from the erroneous premise that coercion as to price in condemnation settlements is imposed only upon the landowner and that the government is under no influence to pay more than its appraisal of the fair market value of the property. Unlike the

---

[1] See also *United States* v. *Bailey*, 115 F.2d 433, 434 (C.A. 5); *United States* v. *Reynolds*, 115 F.2d 294, 296 (C.A. 5).

private purchaser, who is free to seek other land if he cannot obtain a certain parcel at an acceptable price, the government, in acquiring land for public projects like the urban renewal enterprise involved here, must obtain the particular parcels which uniquely satisfy its requirements. A principal reason for the eminent domain power is to protect against exorbitant charges for a particular parcel needed for a project. But it would be unwise for the government to require a trial of every case in which the landowner does not agree to accept the government's appraisal. In fact, Congress has recognized that the government must purchase land by negotiated settlements at a price in excess of the government's appraisal of fair market value and has specifically authorized land acquisition in excess of appraised value. *E.g.*, Land Acquisition Policy Act of 1960, Sec. 301, 74 Stat. 480, 502; Military Construction Appropriation Act of 1961, Sec. 111, 74 Stat. 463, 466; Military Construction Appropriation Act of 1959, Sec. 612, 72 Stat. 1096, 1099.

Many considerations that are unrelated to fair market value may lead government negotiators reasonably to decide that a compensation dispute should be settled at a higher price. See *Foster* v. *United States,* 145 F. 2d 873 (C.A. 6). The government, like other prospective litigants, must weigh the cost and delay of trial against the probability of a favorable verdict. Acceptability of a settlement often depends upon the experience of condemnation awards in a particular district or area, the degree of public acceptance of the project, and other considerations relevant to a predic-

tion of jury behavior, but completely irrelevant to fair market value. And the delay incident to a final trial determination is particularly important because interest accrues on any amount by which the final award exceeds the government's deposit.

Furthermore, the unreliability of settlement prices as evidence of fair market value cannot be cured by permitting the acquiring agency to show the amount it paid above market price. The widely varying circumstances which may induce the government to agree to a somewhat inflated price cannot be reduced to a standard percentage. Indeed, it is often impossible accurately to determine the excess amount offered or paid. And, in all events, a sub-trial on the issue whether something over market price was paid would impose an unreasonable burden on the parties and the compensation tribunal.

3. The issue presented by this case is important in the administration of the federal government's land acquisition program, which involves the purchase of more than 20,000 tracts of land each year, at a cost of more than $100 million. 1967 *Att'y Gen. Ann. Rep.* 320. The government has strenuously pursued a policy of negotiating purchases of land without condemnation and of settling compensation claims in condemnation proceedings without trial. Thus, in 1967, the total cost of lands acquired by purchase was double the amount paid in disposing of condemnation cases. *Id.* p. 295. And, while exact figures are not available, the great majority of condemnation cases is disposed of by settlements without trial. The government's policy has served to reduce the number of compensation cases in

the federal courts [2] and to provide prompt and fair payment to landowners for property which they must vacate. If the decision below is permitted to stand, however, it necessarily will require a more cautious policy in negotiating settlements, because any payment in excess of the appraised value, which may be reasonable in a negotiation involving a small tract, for example, could be introduced against the government in a contested case involving a much larger tract, where application of the same premium would produce an exorbitant award.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
CLYDE O. MARTZ,
Assistant Attorney General.
JOSEPH J. CONNOLLY,
Assistant to the Solicitor General.
ROGER P. MARQUIS,
WILLIAM M. COHEN,
Attorneys.

JULY 1968.

[2] In his annual reports for 1963 and 1964 (p. 113 and pp. 114–115, respectively) the Director, Administrative Office of the United States Courts, took occasion to commend the Lands Division for marked progress in reducing the number of pending tracts in the land condemnation cases on the dockets of the district courts.

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,410
No. 20,485

DONALD S. NASH AND SYLVIA K. NASH, APPELLANTS,

v.

D.C. REDEVELOPMENT LAND AGENCY, APPELLEE.

No. 20,491

D.C. REDEVELOPMENT LAND AGENCY, APPELLANT,

v.

DONALD S. NASH AND SYLVIA K. NASH, APPELLEES.

Appeals from the United States District Court
for the District of Columbia

Decided October 23, 1967

Mr. William T. Hannan, with whom *Messrs. Joseph F. Castiello, Ralph F. Berlow* and *Kent D. Thorup* were on the brief, for appellants in Nos. 20,410 and 20,485 and appellee in No. 20,491.

Mr. William M. Cohen, Attorney, Department of Justice, with whom *Assistant Attorney General Edwin L. Weisl, Jr.,* and *Mr. Roger P. Marquis,* Attorney,

313-786—68——2

Department of Justice, were on the brief, for appellant in No. 20,491 and appellee in Nos. 20,410 and 20,485.

Before BAZELON, *Chief Judge* and McGOWAN and TAMM, *Circuit Judges*.

Per Curiam: These are cross-appeals from a condemnation judgment of the District Court making an award for three parcels of land. The landowners' appeal asserts that the District Court erred in proceeding with the condemnation proceedings before determining (1) whether certain alleys had been closed and thereby made part of the condemned property, and (2) whether the current zoning classification was correct.[1] In the other appeal, the condemnor Redevelopment Land Agency (RLA) contends that the District Court erred when it admitted evidence of an allegedly unconsummated offer of settlement to show market value.[2]

The district judge concluded that the alleys were not closed because the Commissioners of the District of Columbia had not taken the necessary action to close them.[3] On the zoning issue, he held that the zoning and condemnation cases could not be effectively tried together. Therefore, he did not deal with the merits of the zoning classification but did allow the owners to introduce evidence of the probability of rezoning and that the land was currently used as a

[1] On the same day as condemnation was begun, the landowners filed an independent suit for equitable relief, alleging ownership of the alleys and that the subject property had been unlawfully rezoned.

[2] The offer was made by a landowner to the RLA in respect of a tract of land which was in the same project area and condemned at the same time as the land here in suit.

[3] The applicable statutes are 7 D.C. Code §§ 305, 401 (1967).

parking lot, a non-conforming use.[4] With regard to the second appeal, the District Court held that the evidence of the condemnation settlement indicated an agreed price and not a mere naked offer, and that it was admissible when offered by the landowner. It regarded the essential issue as one of comparability, as to which it permitted the condemnor to make a full showing.

We affirm, as against both appeals, the judgment entered in the District Court. The discretion exercised by the district judge with respect to the zoning and alley questions so plainly warrants no correction by us that we do not pursue the matter further. The admissibility of the settlement, however, merits more detailed comment. The owners' expert witness testified that his original estimate of the value of the neighboring junkyard was that it was worth $5.00 a square foot, and that he later learned that it had been sold to the RLA for $38,000.[5] On cross-examination, doubt appeared as to whether the settlement of the

[4] The condemnees purchased this property in 1957. In 1958 the zoning classification was changed from C–2 to R–4. The owners contested this rezoning classification twice in 1958 and both times their application for a change of classification was denied without a hearing. The further remedies available to them were not pursued.

[5] On the basis of $38,000, the land would be worth about $6 a square foot. But this figure does not take into consideration any of the appurtenances and is obtained merely by dividing $38,000 by the size of the junkyard, 6,345 square feet. The owners wanted to introduce this because the RLA had only offered them $2 a square foot for their property, which was similarly situated and had the same zoning classification. The only apparent difference was that the property in suit was used as a non-conforming parking lot, whereas the other was a non-conforming junkyard, a factor which the condemnor stressed in its evidence of non-comparability.

junkyard transaction had been completed. The RLA thereupon moved for a mistrial.[6]

The district judge asked both attorneys to approach the bench and discuss the merits of the motion. The RLA's attorney represented to the judge that the $38,000 offer from the junkyard owners had not been finally accepted by the Justice Department, which has final authority in this area, and presented evidence to this effect.[7] The judge then stated that if this was only a naked offer of settlement it was inadmissible. The landowners' attorney responded by pointing out that both the RLA and the junkyard owners were represented by counsel who had negotiated what the landowners thought was a final sales figure. Moreover, he said, they had heard nothing to the contrary since the negotiations. The RLA's attorney then admitted that his office had recommended to the Justice Department that the offer be accepted, and that he considered it a fair settlement, but urged the offer was still inadmissible because it had not been finally accepted by the Justice Department. The judge told

---

[6] The RLA also urged upon the district court and this court that evidence concerning the junkyard transaction was inadmissible because it involved a sale made under the threat of condemnation. The RLA relies on *District of Columbia Redevelopment Land Agency* v. *61 Parcels of Land*, 98 U.S. App. D.C. 367, 235 F.2d 864 (1956), which held that evidence of comparable sales offered by the RLA were inadmissible because the sales were made under condemnation. The district court rejected this argument, and so do we. The reasons which disable a condemnor from putting in evidence of purchases it has made in settlement of condemnation suits have no application to a landowner who offers such evidence himself.

[7] The offers of landowners are submitted to the Justice Department in the form of a stipulation and when the Government accepts the offer it signs the stipulation. The RLA's attorney presented this stipulation which was signed by the junkyard owners but not by the Justice Department.

the RLA's counsel he could not understand why his office was ready to pay $5 a square foot for the junkyard and only $2 in this case. The explanation given by the RLA was that its appraisers considered a junkyard more valuable than a parking lot. The judge said this could be shown by evidence and argued to the jury, and denied the motion. Thus, the judge apparently concluded that, although the processing of the recommendation within the Government had not reached the stage of final acceptance in the formal sense of the completion of all the governmental paper work, the $38,000 was much more than a simple offer and could fairly be admitted.

This conclusion is substantiated by the later testimony of Mr. Blackwelder, the attorney who represented the RLA in the junkyard condemnation litigation and in the negotiations leading to its settlement.[8] The RLA used this witness to attack again the finality of the $38,000 offer in that he stated the offer was conditioned upon the junkyard owners being permitted to remove certain fixtures and the Government had not agreed to this. On cross-examination, Mr. Blackwelder explained that the junkyard had an RLA appraised value of about $39,400, which included the value of the fixtures. He admitted that the offer of $38,000 was not so different from the appraisal as to cause it to be rejected, and that he had recommended its acceptance. He further characterized his experience to be that, in the normal course of events, his recommendations were accepted by the Justice Department. Thus, in light of the whole record, we find no necessity to hold that the district judge's action was reversible error.

---

[8] Both Mr. Blackwelder and Mr. Liotta, who represented the RLA in the instant case, are attorneys employed by the Department of Justice.

Although the figure eventually paid by the RLA,[9] $39,875, was slightly different from the original offer, it was not significant enough to justify reversal. The jury[10] was not misled by the testimony in issue because the value of the land based on the final settlement was $5.30 a square foot.[11] Moreover, the district court correctly left the question of comparability with the jury, and the RLA was given ample opportunity to explain the disparity between the value placed by RLA on the junkyard and the property here in suit.

Affirmed.

TAMM, *Circuit Judge,* dissenting: I would reverse and remand this case for a new trial. In my opinion, the admission of testimony by the landowners' expert appraisal witness relating to an unconsummated settlement offer defined only in the terms of the land-

---

[9] The final balance was not struck until after the completion of the condemnation proceedings. Therefore, the difference between the final settlement and the original offer was first raised on appeal. The difference is explained by the fact that the value of certain fixtures was included in the final settlement whereas it was not in the offer made by the owners of the junkyard.

[10] It is important to note that the jury consists of people who have some expertise in real estate valuation. Also, besides hearing all the evidence, the jury saw the property and the surrounding area.

[11] The $5.30 figure was ascertained in the following manner. The fixtures were appraised to be worth from $4,750 to $6,000. Assuming that they were worth $6,000 and subtracting this from $39,875 and dividing the result by the size of the junkyard, 6345 sq. ft., the value per square foot is $5.30. This seems to be a fair figure because we are giving the RLA the benefit of the doubt by assuming that the fixtures were worth the highest figure, which tends to reduce the amount paid for the land. Furthermore, the RLA appraised the property to be worth $39,400 and, subtracting the $6,000, this is still within the $5.00 range.

owners' statement of the figure he would accept in settlement of the case constituted prejudicial error. Since the landowners' expert witness predicated his ultimate appraisal upon this unconsummated settlement figure, I believe that this witness' testimony was without any evidentiary value. Without the testimony of this witness, the only testimony in the record is that of the appellee's expert witness. Under these circumstances, I believe the case should be remanded for a new trial.

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,491

D.C. REDEVELOPMENT LAND AGENCY, APPELLANT,

v.

DONALD S. NASH, ET AL., APPELLEES.

Filed April 19, 1968

Before BAZELON, *Chief Judge;* DANAHER, BURGER, WRIGHT, MCGOWAN, TAMM, LEVENTHAL, and ROBINSON, *Circuit Judges,* in Chambers.

ORDER

On consideration of appellant's petition for rehearing *en banc* and of appellees' answer thereto, it is

ORDERED by the Court *en banc* that appellant's aforesaid petition is denied.

Per Curiam.

Circuit Judge McGowan, with whom Chief Judge Bazelon concurs, votes to deny appellant's aforesaid petition for the reasons set forth in the attached statement.

Circuit Judges Danaher, Burger, and Tamm would grant appellant's petition for rehearing *en banc.*

Statement of Circuit Judge McGowan Why He Believes the Petition for Rehearing En Banc Should Be Denied

As a participant in the *per curiam* decision in respect of which the Government seeks rehearing *en banc*, it may be useful to spell out at some length the reasons why I have voted to deny that request. The panel opinion did not deal with the matter in detail because of the feebleness of the assault mounted by the Government against the trial court's action. The petition for rehearing is a major, albeit belated, effort; and it warrants an enlargement of the discussion on our part.

This was a condemnation action by the Redevelopment Land Agency to acquire several contiguous tracts of land for a housing development. In the trial of this particular action, the expert witness for the condemnee first testified that the land was worth approximately $5.00 per sq. ft., as contrasted with the $2.00 per sq. ft. which had been testified to by the Government's expert. He was then asked if there had been any other transactions in the vicinity and, over objection, he was allowed to testify that the condemnor had paid $5.00 a sq. ft. for another tract approximately 100 feet away. The Government attorney, after saying "I think it was a fair price of course, probably compromise," objected to its admission solely on the ground of *District of Columbia R.L.A.* v. *61 Parcels*, 98 U.S.App.D.C. 367, 235 F.2d 864 (1956). He characterized that case as requiring the exclusion of this evidence because it involved a sale to the Government of land "right in this project area." The District Judge questioned whether this was a necessary conclusion. He said he could understand how a condemnee might well have reason to complain of such evidence when offered by the Government, since the condemnee

was under the compulsion of condemnation. But, if the immediate condemnee chose to offer the evidence himself, he did not see the relevance of the compulsion principle. In any event, he finally concluded to admit the evidence, and to give the Government a full opportunity to show the non-comparability of the two properties. The Government took advantage of this opportunity, and the jury brought in a verdict eventually which was about midway between the $2.00 and the $5.00.

On appeal it was argued to us that no sale made in the shadow of condemnation can be admitted in evidence by anybody, because of the compulsion and coercion inherent in the condemnation power. Two members of the panel were not satisfied that the District Judge had abused his discretion in the admission of evidence to a degree necessitating reversal. The dissenting judge was primarily concerned with a subsidiary point, namely, the question of whether the Government and the adjoining landowner had really arrived at a final meeting of the minds with respect to price. The majority were satisfied that, for the purpose in question, there had been such a meeting of the minds; and the majority did not, either in terms or in purpose, hold that an unaccepted offer would be admissible.

The Government now argues that the panel's ruling on admissibility is contrary to the law of the circuit. I am far from being convinced that this is the case. *61 Parcels* cannot be directly controlling because there it was the RLA which claimed error in the exclusion of evidence offered by it of the prices at which it had acquired comparable parcels. It was in that context that Judge Fahy, in his opinion in *61 Parcels,* undertook to define what would be the "compulsion, coercion or compromise" which must be negated by one

who offers evidence of prior sales. He said there would be no such disqualification unless it appears that the sale was, among other things, "under pressure of the exercise of the power of eminent domain, or other coercion . . ." Since he was considering the admissibility of evidence offered by the *condemnor* as distinct from the *condemnee,* it seems reasonable that the coercion he was talking about was that which is felt by the party who is the object of the condemnation power, and not by the one who has it.

In considering Judge Fahy's comments in *61 Parcels,* account must be taken of *Hannan* v. *United States,* 76 U.S. App. D.C. 118, 131 F. 2d 441 (1942). In that case the Government was securing land for the new War Department Building; and the trial court excluded evidence offered by certain condemnees of the prices which the Government had paid for other parcels in the condemned area. The court in *Hannan* said that it was not error for the evidence to be excluded for two reasons. First, the person who offers evidence of other transactions must establish preliminarily that the purchase was made "without compulsion, coercion, or compromise," and no such showing had been made. Secondly, said the court, the reception of evidence of this kind in each case is to be left to the discretion of the trial judge "[T]o the end that the jury may be placed in the best position to pass upon the ultimate question of fact . . ." His discretion in each instance will not be disturbed "except for good reason." The court found that other evidence of private sales had come in, and concluded that, looking at the whole record, the jury was in a position to decide the question fairly.

Judge Stephens dissented in *Hannan* on the ground that, if the court was to say for the first time that the offeror of evidence of his kind must preliminarily

qualify it as free from compulsion, the case should be retried and this opportunity given the condemnee. As to the outcome of such an effort, he said "[T]hat they can qualify it would seem hardly doubtful because the circumstances under which a condemnor would be under compulsion must be most unusual—since if a condemnor cannot purchase at a reasonable price he is at liberty to take the property by condemnation proceedings." Further, Judge Stephens felt that the majority, in a case where they appeared to recognize the discretion vested in the trial judge, had unnecessarily appeared to change the law of the circuit:

> Upon the question whether in a condemnation proceeding evidence may be introduced as to the price paid by a condemnor for property similar to that in suit, there is a division of authority. The weight of authority outside this jurisdiction is that such evidence is inadmissible. But in Washington Home for Incurables v. Hazen, 1934, 63 App. D.C. 185, 70 F.2d 847, we adopted the minority rule and held the admission of such evidence proper. We based our ruling upon O'Malley v. Commonwealth, 1902, 182 Mass. 196, 65 N.E. 30, in which the opinion for the Supreme Judicial Court of Massachusetts was written by Holmes, then Chief Justice of that tribunal. The theory of admissibility is that although evidence of a purchase by the condemnor of property similar to that involved in a condemnation proceeding is less persuasive on the issue of market value than evidence of a purchase by a stranger, there is no reason in principle why such evidence should not be admitted provided the purchase by the condemnor was made without compulsion; in short, it is held that objection to this type of evidence goes to its weight, not to its competency. *Id.* at 121, 131 F.2d at 444.

In the *Washington Home for Incurables* case, cited by Judge Stephens, this court reversed the lower court for excluding evidence of other acquisitions made by the condemnor, and the court showed itself to be sharply aware of the differing positions in which a condemnee and a condemnor find themselves on the question of compulsion. It held that the District Commissioners could not be regarded as under any compulsion or coercion simply because they were proceeding to acquire properties through the use of the condemnation power.

The District operates under a quick-taking statute. 16 D.C. Code § 1353. Under that statute, the Government can and does proceed by depositing in court a sum of money which it considers to be the fair market value; and it simultaneously acquires title and right to possession. How it can be said to be under any significant compulsion to pay more for property than it is worth eludes me. I can understand why a condemnee might still insist that the Government's unilateral estimate of value should not come in against his objection, but, if he wishes to put it in, I cannot deteet any element of coercion or compulsion that should invariably keep it from the jury's consideration.

The cases cited by the Government in other circuits seem to me something less than sharply focused;[1] and they do not deal with the realities of this problem in any way commensurable with what has been said in this circuit. Even if our present rule be taken to be

[1] The Government's citations are to cases in the Third, Fifth, and Eighth Circuits. The three latest of these are *Hickey* v. *United States*, 208 F. 2d 269 (3rd Cir. 1953); *Slattery Co.* v. *United States*, 231 F. 2d 37 (5th Cir. 1956); and *Evans* v. *United States*, 326 F. 2d 827 (8th Cir. 1964). *Hickey* does not involve at all the offer by a condemnee of evidence of comparable acquisitions by the Government. *Slattery* states the prin-

that a condemnee offering evidence of this kind must preliminarily qualify it by showing that the Government is free of compulsion, reversal is hardly necessary in this case since the Government lawyer himself prefaced his objection to admissibility by characterizing the price as fair.

As to the RLA's claim that the panel has handed down a decision which is squarely in conflict with the existing law of the circuit, that depends upon how you define that law. The task of definition, as indicated above, is a very formidable one under the circumstances. After reading carefully the cases discussed above, I would have to answer somewhat as follows if anyone asked me what I thought the current law of the circuit is: The admission of evidence in condemnation cases is committed to the discretion of the trial judge. Where one party to a transaction involving comparable property is armed with the condemnation power, the court should be especially alert to the distortions of coercion. Jury verdicts will not be reversed unless, looking at the whole record, the reviewing court is convinced that the jury did not have a reasonable opportunity to determine the question of fair market value and that its conclusion is patently an unjust product of an unjust proceeding.

The justification for an *en banc* would presumably be that, if we are to have a rule that neither condemnee nor condemnor can put in evidence of a condemnor's other acquisitions in the same area, a new and better theoretical formulation is necessary than the one the Government has given us thus far. The RLA is never very clear in its petition for rehearing

---

ciple contended for by the Government, but the condemnee still succeeded in getting the verdict reversed on other grounds. *Evans* cites *Slattery*, and then goes on to indicate that there was no evidence of the comparability of the respective properties to support the condemnee's offer of proof.

en banc just what it would like to have us declare the general rule to be. It first talks about how admissibility should not be a one-way street—a suggestion which apparently did not impress the RLA when, after *Hannan's* exclusion of evidence offered by the condemnee, the RLA tried in *61 Parcels* to introduce evidence of its own acquisitions.

The petition subsequently seems to emphasize the compromise rationale. First it says that, because the Government accepted an offer of settlement of a pending condemnation action, the Government was under coercion to do so in order to be spared the trouble and expense of further litigation. I am not impressed with the severity of this asserted compulsion. Secondly, it refers to the evidentiary rule that evidence of compromise is inadmissible. It cites two cases for this proposition. Neither involves the condemnation problem. In *Home Ins. Co.* v. *Baltimore Warehouse Co.*, 93 U.S. 527 (1876), it was held that, in a case involving the coverage of an insurance policy, the trial court did not err in excluding an unaccepted offer of compromise. *Martello* v. *Hawley*, 112 U.S. App. D.C. 129, 300 F. 2d 721 (1962), held that a settlement made by one of two joint tortfeasors should not be made known to the jury.

The problem we face does not lend itself very well to the compromise rule in other situations. Is there any real difference, for example, between a price arrived at by the Government and the land-owner before a condemnation suit is filed, and one which they fix upon during the pendency of the litigation? It is the fact that one party is possessed of the power of condemnation which keeps this transaction in either case from being a true arm's length bargain. Whenever the Government decides to pay a certain price, it has arguably made an uncoerced judgment

as to fair market value which is relevant in the trial of any other condemnation of related property, and which, when offered by the condemnee, the trial judge does not err in admitting, provided he gives the Government a full opportunity to show to the jury the differences between the two properties which explain the disparity in the Government's respective evaluations.

APPENDIX C

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 20,410 and 20,485

DONALD S. NASH AND SYLVIA K. NASH, APPELLANTS

v.

D.C. REDEVELOPMENT LAND AGENCY, APPELLEE

No. 20,491

D.C. REDEVELOPMENT LAND AGENCY, APPELLANT

v.

DONALD S. NASH AND SYLVIA K. NASH, APPELLEES

Filed October 23, 1967, Nathan J. Paulson, *Clerk*

Appeals from the United States District Court for the District of Columbia

Before BAZELON, *Chief Judge,* and MCGOWAN and TAMM, *Circuit Judges.*

JUDGMENT

These cases came on to be heard on the records on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the District Court appealed from in these cases is hereby affirmed.

Per Curiam.

Dated: October 23, 1967

Separate dissenting opinion by Circuit Judge Tamm.

U.S. GOVERNMENT PRINTING OFFICE: 1968